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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 564

FIDELITY AND DEPOSIT COMPANY OF MARY-
LAND, A CORPORATION,

Petitioner,

against

PINKERTON'S NATIONAL DETECTIVE AGENCY,
INC., A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT,
AND BRIEF IN SUPPORT THEREOF.

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Fidelity and Deposit Company of Maryland, a corpora-
tion (hereinafter called the "Surety"), respectively prays
that this Court issue a writ of certiorari to review the judg-
ment of the Circuit Court of Appeals for the Seventh Cir-
cuit entered December 2, 1943, wherein that court reversed
a judgment entered December 24, 1942 by the District Court
of the United States for the Northern District of Illinois,

Eastern Division (R. 57, 65), and remanded this cause to said District Court with directions to enter a judgment for respondent, Pinkerton's National Detective Agency, Inc., a corporation (hereinafter called "Pinkerton"). The judgment of the District Court denied the motion of Pinkerton for a summary judgment, allowed the Surety's motion for summary judgment, and held that Pinkerton could not recover from the Surety upon the official bond of Lawrence J. O'Connell, as Chief Security Examiner of the Illinois Industrial Commission, for the alleged conversion by O'Connell of a United States Treasury bond which Pinkerton deposited with said O'Connell in attempting to qualify as a self-insurer under the Illinois Workmen's Compensation Act.

Summary Statement of Matters Involved.

This petition involves the questions:

First. May the Circuit Court of Appeals in a summary judgment proceeding try and decide the contested, material issue of fact as to whether O'Connell received Pinkerton's treasury bond by virtue of his office and thus deprive the surety of its right to a jury trial thereon, or is the Circuit Court of Appeals required, under Rule 56 of the Rules of Civil Procedure, to reverse and remand this cause for trial since a genuine issue as to such fact is present?

Second. Whether the Illinois Industrial Commission lacked power to accept Pinkerton's deposit of collateral, thereby establishing as a matter of law that O'Connell did not act by virtue of his office or employment?

Third. Whether Pinkerton's suit upon O'Connell's official bond is barred by the Illinois Five Year Statute of Limitations and whether the Circuit Court of Appeals is obliged to apply to Pinkerton's suit the rule thereon established by the reviewing courts of Illinois?

Facts.

Between 1933 and September 29, 1941, O'Connell was employed as Chief Security Examiner by the Illinois Industrial Commission (R. 43) and gave bond in the penal sum of \$20,000.00, with petitioner as surety thereon, conditioned upon the faithful performance of all duties pertaining to his office as Chief Security Examiner and his accounting for and paying over to parties entitled thereto all property that came into his hands by virtue of his office (R. 6).

August 9, 1935 Pinkerton, in order to qualify as a self-insurer under the Illinois Workmen's Compensation Act, entered into an agreement signed by Pinkerton and signed in the name of the Industrial Commission of Illinois by O'Connell, as Chief Security Examiner (R. 35), and deposited a \$10,000 United States Treasury bond (R. 24), which, the agreement provided, was to be returned by the Commission whenever "no payments are due and unpaid from said Pinkerton's National Detective Agency, Inc., to its employees or others under the Compensation law."

Pinkerton's complaint filed July 21, 1942 alleged that O'Connell "during the year 1936" converted said treasury bond to his own use (R. 4) and prayed for judgment for \$10,000, plus interest thereon (R. 5).

The surety's answer denies that either O'Connell, as Chief Security Examiner, or the Illinois Industrial Commission ever had any right, power or duty to require of or accept from Pinkerton the deposit of its treasury bond; denies that said treasury bond came into O'Connell's hands by virtue of his office, as Chief Security Examiner, and pleads the five year Statute of Limitations (R. 7-10).

September 21, 1942, pursuant to notice previously given, the surety filed its motion for summary judgment (R. 19). After receipt of the surety's notice, Pinkerton served no-

tice of its own motion for summary judgment and that motion was filed on September 21, 1942 at the time the surety's motion was filed (R. 10).

The surety filed the affidavit of John J. Funk in support of its motion and the affidavit of Peter J. Angsten in support of its motion, and in opposition to Pinkerton's motion. Pinkerton filed the affidavit of J. O. Camden in support of its motion and various letters and documents from a file found in the office of the Industrial Commission. Funk's affidavit states the substance of the documents in the above mentioned file and that an audit, examined by him, shows that of the one thousand Illinois self-insurers, all deposited their collateral with qualified banks and trust companies and that none deposited collateral with the Commission except thirty-four who deposited their collateral with O'Connell, Chief Security Examiner, for the Illinois Industrial Commission, which latter collateral the accountants could not locate. The letters referred to by Funk are the same letters copies of which were subsequently filed and the substance of the letters is (1) demands for and remittance of interest coupons; and (2) demands for and the refusal to return Pinkerton's Treasury bond in July, 1941 (R. 20-24).

The gist of Camden's affidavit is that Pinkerton did deposit its treasury bond with O'Connell, Chief Security Examiner, for the Industrial Commission, on August 9, 1935, at which time the escrow agreement of that date was executed; that on May 24, 1941, Pinkerton insured its compensation liability and had no outstanding liability; that on January 5, 1942, Pinkerton demanded return of its treasury bond and Borah, then Chairman of the Industrial Commission, refused to return or exhibit same; that Pinkerton first discovered the conversion on January 30, 1942, when Borah advised that the treasury bond was missing; and that between March 15, 1937 and January 30, 1942,

O'Connell concealed the fact that he had converted Pinkerton's treasury bond (R. 11-18).

The affidavit of Angsten, Chairman of the Illinois Industrial Commission during the period of O'Connell's employment, states O'Connell's duties were "only to examine the financial statements of employers who applied * * * for self insurance, and * * * if such statements were not satisfactory to the Commission, to inform such employer thereof and * * * of the amount of securities such employer should deposit in the name of a qualified trustee in a qualified bank or trust company of the employer's own selection." Angsten further states that neither he nor any other member of the Commission, to his knowledge, knew of Pinkerton's deposit agreement of August 9, 1935 or of the deposit of its treasury bond and that if such agreement was executed by O'Connell, he did so "without the authority, approval, direction or knowledge of the said Commission, or this affiant, as Chairman thereof, and outside the duties of his said employment" (R. 43-44). Angsten attached to his affidavit a copy of the rules adopted by the Commission (R. 44-56).

Pinkerton filed no affidavit or other evidence purporting to show any specific delegation of duties to O'Connell or to specifically show what his duties were and the record contains no evidence in contradiction to Angsten's affidavit unless the letters and statements of acts justify inferences opposed to Angsten's testimony. In the latter event there would be an issue of fact as to O'Connell's duties.

Jurisdiction of the Court.

The court has jurisdiction under Section 240 of the Judicial Code, as amended (43 Stat. 938).

Questions Presented and Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the trial court with directions to enter a judgment in favor of Pinkerton.
2. In trying and deciding the genuine issue of material fact as to whether O'Connell's acts were by virtue of his office, instead of remanding the cause for a trial upon that issue, in violation of Rule 56 of the Federal Rules of Civil Procedure and in conflict with the decisions of the other Circuit Courts of Appeals.
3. In refusing to hold, as a matter of law, that O'Connell did not act by virtue of his office for the reason that the Industrial Commission lacks power to act as depositary for Pinkerton's collateral.
4. In holding the Illinois five year statute of limitations inapplicable, thereby refusing to follow the doctrine of applicable decisions of Illinois Courts of review.

Reasons for Allowance of the Writ.

We understand this Court may exercise its discretion to grant the writ of certiorari where one Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals, or has decided an important question of local law in conflict with applicable local decisions, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In the case at bar, each of the above elements is present.

The Circuit Court of Appeals has assumed the power of trying and deciding in summary judgment proceedings the

genuine issue of material fact as to whether O'Connell's acts were by virtue of his office or employment, in violation of Rule 56 of the Federal Rules of Civil Procedure and in conflict with decisions of other Circuit Courts of Appeal, which construe Rule 56 to limit a court's power by way of summary judgment proceedings to cases where there is no genuine issue of material fact.

The Circuit Court of Appeals also held the Illinois five year statute of limitations inapplicable in disregard of applicable local decisions.

In trying contested material issues of fact on summary judgment proceedings and thereby depriving the surety of its right to a jury trial and in holding that the cause of action is upon an escrow agreement to which the surety is not a party and upon which Pinkerton does not purport to bring its suit, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court has never given its construction as to the power conferred upon lower courts in summary judgment proceedings by Rule 56, and the question is of sufficient importance to justify the Court in granting the writ.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court for its review and determination on a day certain, to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket as No. 8250, and that said judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court, or, in the alternative, that the judgment of the said United States Circuit Court of Appeals be reversed and it be directed to remand this

cause to the United States District Court for the Northern
District of Illinois, Eastern Division, for trial.

Dated: December 24, 1943.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a corporation,
Petitioner,

By LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
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